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10 UNITED STATES DISTRICT COURT  
11 EASTERN DISTRICT OF WASHINGTON  
12 (HONORABLE THOMAS O. RICE)

13 UNITED STATES OF AMERICA, )  
14 Plaintiff, ) CR-12-00138-TOR  
15 vs. ) Response to the Presentence  
16 ) Investigation Report  
17 MICHAEL JAMES PAUCKERT, )  
18 )  
19 Defendant. )  
20 \_\_\_\_\_)

21 TO: MICHAEL C. ORMSBY, UNITED STATES ATTORNEY  
22 TIMOTHY J. OHMS, ASSISTANT UNITED STATES ATTORNEY  
23 SHANE MOORE, UNITED STATES PROBATION OFFICER

24 MICHAEL JAMES PAUCKERT, through counsel, Robert R.  
Fischer for the Federal Defenders of Eastern Washington and Idaho,  
submits the following response and objections to the presentence  
investigation report (PSR):

**I. RESPONSES/ OBJECTIONS:**

25 A. **BASE Offense Level of 20.** The Defendant believes the base  
26 offense level is accurate and does not object.  
27  
28 B. **Specific Offense Characteristic Enhancement Pursuant to**  
29 **USSG Sec. 2K2.1(b)(3)(B).** The Defendant believes the enhancement

1 under this section and added to the base offense level base for a 2 level  
2 increase at para. 43. Of the PSI is accurate.

3 **C. Objection to 4 Level Increase “because the Defendant used or**  
4 **possessed the firearm in connection with another felony”.**<sup>1</sup> The  
5 PSI at Page 13, Par. 44, provides for a 4 level increase pursuant to USSG  
6 Sec. 2K2.1(b)(6)(B) based upon “the defendant used or possessed any  
7 firearm or ammunition in connection with another felony. The basis for  
8 this adjustment is a Washington State conviction that dates back to  
9 2006, in connection with a residential burglary where “. . . the defendant  
10 [Mr. Pauckert], during the burglary, stole six firearms and several  
11 rounds of ammunition.” *Id.* Yet, the Five Count Indictment in the  
12 instant case alleges that all acts of the Defendant began between on or  
13 about May 3, 2012 and May 25, 2012, except for the alleged SORNA  
14 violation, that occurred between on or about April of 2012 and May 23,  
15 2012. Thus, all conduct relevant to the instant indictment occurred no  
16 sooner than April of 2012. These facts are ultimately dispositive, as more  
17 fully discussed below.

18 It is also important to note that the .38 Special Smith&Wesson  
19 revolver that Mr. Pauckert possessed had no nexus to the 2006 burglary,  
20 as it was not one of the six firearms stolen back in 2006. In fact, Mr.  
21 Pauckert found the .38 Special on Craigslist and traded a gold ring for it

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22 <sup>1</sup> Therefore the Defendant also objects to the Adjusted Base Offense Level/  
23 Total Offense Level.

a short time before he was arrested on May 23, 2012<sup>2</sup>.

2 The government take exception to the PSI's application of the  
3 proposed 4 level increase in its "Response To Presentence Investigation  
4 Report" (ECF NO. 43 , hereinafter "Government's Response"). "The  
5 government believes there is conflicting authority over the application . .  
6 .based on the Defendant's past possession of a firearm in connection with  
7 another felony". As its authority the government cites to two Ninth  
8 Circuit cases; the first being *United States v. Nichols*, 464 F.3d 1117 (9<sup>th</sup>  
9 Cir. 2006). Actually, the issue formulated by the sentencing court in  
10 Nichols was, wether or not the firearm used in a prior felony offense has  
11 to be the same firearm as set forth in the indictment, and thus the  
12 offense of conviction. The Court of Appeals upheld the lower court's  
13 ruling that the firearm utilized for purposes of the enhancement was not  
14 restricted to the firearm alleged in the indictment, but on different  
15 grounds. The Court held that the possession of the firearm, not named  
16 in the instant indictment, but used in an earlier crime that was part of  
17 the defendant's "relevant conduct" to the instant offense, could be used to

1 enhance his sentence under Sec. 2K2.1(b)(5) - now Sec. 2K2.1(b)(6)(B).  
2 As noted by the government in its response, the Nichols Court did leave  
3 open the issue whether an enhancement would be proper in a case where  
4 prior conduct was unrelated. However, the Defendant agrees that the  
5 Ninth Circuit's decision in *United States v. Bell*, only bolsters the holding  
6 in *Nichols*, and does not extend its reasoning pursuant to other Circuits  
7 that *Nichols* considered, but did not follow. (Citations omitted, See  
8 Government's Response at 3). In this regard, it appears the Ninth  
9 Circuit was unwilling to extend the enhancement's reach to unindicted  
10 conduct. This could be for several reasons. First, most if not all the  
11 enhancements in USSG Sec. 2K2.1 apply to the "instant offense". For  
12 example, the enhancements for number of firearms, and if any firearm  
13 was stolen, or had and altered or obliterated serial number, applies only  
14 to the instant offense. See USSG Sec. 2K2.1(b)(1) and (4) respectively.  
15 Second, recognizing the holding in *United States v. Davis*, 360 F.3d 901  
16 (8<sup>th</sup> Cir. 2004) (including firearm in commission of non-contemporaneous  
17 conduct 10 days earlier to the instant offense), there still be must some  
18 reasonable restrictions on applications of the subject guidelines that  
19 prohibit reaching far back in time to a prior conviction to enhance the  
20 base offense for the instant offense. It is a well accepted axiom in law  
21 that a statute or guideline must be read as a whole when construing its  
22 meaning. (Citation omitted) c.f. .

23 Because the defendant agrees with government that the 2006

1 residential burglary cited in the PSI does not constitute relevant conduct  
2 under USSG Sec. 1B1.3(a)(1), the 4 point enhancement should not apply.  
3 Moreover, the defendant does agree that it logically follows that the  
4 20006 burglary should be applied to Mr. Pauckert's criminal history  
5 calculation instead, so that 3 points should be added under USSG Sec.  
6 4A1.1(a).

7 **D. Objection to 2 Level Increase "as the Defendant willfully  
8 obstructed or impeded, or attempted to obstruct or impeded the  
9 administration of justice pursuant to USSG Sec. 3C1.1".**

10 In order to support its own conclusions proved in the PSI at 8, para  
11 34., regarding the obstruction enhancement, the PSI writer points to  
12 excerpts of letters written to his girlfriend, Ms. Dodge, after his arrest on  
13 May 23, 2012.<sup>3</sup> The letters must be taken in the context they were  
14 written. This is vastly important because "[o]bstructive conduct can vary  
15 widely in nature, degree of planning, and seriousness." See USSG Sec.  
16 3C1.1, Commentary, Application Note 3. "Application Note 4 set forth  
17 examples of the types of conduct to which this adjustment is intended to  
18 apply . . . [a]lthough the conduct to which this adjustment is not subject  
19 to precise definition comparison of the examples set forth in application  
20 Notes 4 and 5 should assist the court in determining whether the  
21 application of this adjustment is warranted in a particular case." *Id.*

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22 <sup>3</sup> See PSI at 10-11, para. 28-32, dated 12//0412, 06/14/12, 06/15/12, 06/26/12,  
23 and 06/28/12.

1 Application Note 5 sets forth examples of less serious forms of conduct to  
2 which this enhancement is not intended. *Id.* Both lists are non-  
3 exhaustive. *Id.* From these advisements, the Commentary suggests that  
4 both lists must be “material”. The definition of “material”, found in  
5 Application Note 6, means evidence, fact, statement, or information if  
6 believed, would tend to influence or affect the issue under determination.  
7 *Id.* Also see *United States v. Acuna*, 9 F.3d 1442 (9<sup>th</sup> Cir. 1993) (Factual  
8 determinations made in the application of section 3C1.1 are reviewed for  
9 clear error). *United States v. Ford*, 989 F.2d 347, 351 (9th Cir.1993) (The  
10 legal conclusion that Defendant’s conduct constituted an obstruction of  
11 justice within the meaning of section 3C1.1 is reviewed de novo).

12 Given the above, each of Mr. Pauckert’s alleged offending  
13 statements within each letter must be parsed to determine whether any  
14 fit the definition of obstructive conduct.

15 *December 14, 2012, letter.* This advisement to Ms. Dodge does not  
16 appear to diffuse the investigation by law enforcement of his actions, but  
17 those of Ms. Dodge, telling her to minimize her actions. Certainly, given  
18 the nature and extent of their relationship, and that he stayed with the  
19 Dodge family for so long, a reasonable person would wonder what Ms.  
20 Dodge’s involvement was in Mr. Pauckert’s absconding, and hiding in the  
21 Dodge’s residence. In fact, Mr. Pauckert seems to encourage Ms. Dodge  
22 in taking the “high road” by telling her that she didn’t know he was on  
23 the run, that he stayed at the Dodge residence only a few nights, and

1 that when she actually found out what the charges against him were,  
2 “did the right thing & called the cops & had [him] arrested”. This story,  
3 if it panned out, would not impede the investigation of his wrongdoing,  
4 but a potential investigation of Ms. Dodge for harboring a fugitive. The  
5 undersigned however is unaware of any such investigation, or proposed  
6 investigation.

7         *June 14, 2012, letter.* This letter encompasses only two of Mr.  
8 Pauckert’s statements relevant to the alleged obstruction enhancement;  
9 the first having to do with the firearm that Tyson Dodge provided his  
10 own identification in order to successfully consummate the trade. It  
11 appears, without more, that Mr. Pauckert giving away or otherwise  
12 getting rid of his personality. He obviously did not want the firearm to  
13 “go to waste” because of its historical value. Even if he simply “set up  
14 the deal”, as Mr. Pauckert suggests, this does not relieve him of the  
15 liability for possessing it. As for the printers that Mr. Pauckert asked  
16 Ms. Dodge to get rid of, because “they’re pieces of junk & need to be  
17 thrown away”, they were not necessary pieces of evidence to convict him  
18 under 18 U.S.C. Sec. 1028(a). See PSI at 7, para. 16; at 9, para. 23; at  
19 para. 26.

20         *June 15, 2012, letter.* This letter is asking Ms. Dodge simply to gather  
21 reference letters, perhaps to be used at a sentencing hearing or bail  
22 hearing. As the PSI states, any reference to use of the internet, contact  
23 with Ms. Dodge’s child, or out of state, would have no bearing on the

1 instant charges. The SORNA violation, ostensibly, had already been  
2 committed.

3       June 26, 2012, letter. This appears to be a responsive  
4 communication to Ms. Dodge. Regardless of whether Ms. Dodge told Mr.  
5 Pauckert that her brother actually took “entitlement” to it (the weapon)  
6 found in his hamper, Mr. Pauckert knows that if they (most likely law  
7 enforcement) retained the firearm, instead of giving it to Tyson, Mr.  
8 Pauckert is “guilty”. Any other interpretation of the remainder of the  
9 excerpt is pure speculation.

10        *June 28, 2012, letter.* What can be interpreted as yet another  
11 responsive communication, most of this excerpt has to do with Ms.  
12 Dodge’s mother calling the police and doing the ‘right’ thing; similar to  
13 the December 14, 2012 letter discussed above. As for the “device”, and  
14 after “it” had been seized, photographed and examined by law  
15 enforcement, one can certainly assume the forgone conclusion that  
16 anything Ms. Dodge told the police about “it” would change their minds  
17 as to what it was in actuality.

## II. CONCLUSION:

19       Based upon the above, the Adjusted Offense Level for Count Group  
20      Level 1, Count 1 should be 22, not 28. This is based upon a BOL of 20,  
21      an increase of 2 points under U.S.S.G. Sec. 2K2.(b)(3)(B). The same is  
22      true for the correct guideline calculation in Count 2. The PSI's  
23      calculations for count 5 in Group 2 of the PSI should be a 12 not 14.

1 Given the grouping rules there should be no increase in the total offense  
2 level. After a decrease for acceptance and early acceptance of  
3 responsibility under U.S.S.G. Sec. 3E1.1(a) and (b), Mr. Pauckert's Total  
4 adjusted Offense level should be no more than 19 (22-3=19). Given Mr.  
5 Pauckert's Criminal History Category V, (adding 3 points to the his  
6 previously determined 8 points - See PSI at 22, boosting his Category to  
7 the next Level) his Guideline range should be no more than 57-71  
8 months, placing him in Zone D.

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10 Dated: September 10, 2013

11

12 Respectfully Submitted,

13

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## **CERTIFICATE OF SERVICE**

2 I hereby certify that on September 10, 2013, I electronically filed  
3 the foregoing with the Clerk of the Court using the CM/ECF System  
4 which will send notification of such filing to the following: TIMOTHY  
5 OHMS, Assistant United States Attorney.

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